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Bard Peripheral Vascular, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

IN RE: Bard IVC Filters Products Liability
Litigation

No. 2:15-MD-02641-DGC

**BARD'S RESPONSE TO
PLAINTIFF'S REQUEST TO
PRECLUDE EVIDENCE
REGARDING THE
COMPLICATIONS ASSOCIATED
WITH THE SIMON NITINOL
FILTER**

The Plaintiff has complained that Bard should not be permitted to introduce certain evidence regarding the Simon Nitinol Filter (“SNF”), apparently evidence of complications occurring with that filter. Originally, the Plaintiff argued that she was blocked from conducting discovery about those issues, citing Case Management Order No. 10 (Doc. 1319). Later in the discussion, the Plaintiff appeared to back away from that claim. Instead, she appears to be arguing now that Bard’s internal handling of the SNF, both in designating the SNF as the predicate filter for its Recovery Filter regulatory

1 submission and in comparing reports of complications with the two filters, somehow
2 precludes Bard's use of evidence demonstrating complications with the SNF. Bard
3 disagrees.

4 As a threshold matter, Bard submits that Plaintiff's initial reliance on CMO 10 was
5 misplaced. That order afforded the Plaintiff wide-ranging discovery concerning the SNF.
6 The order allowed discovery regarding the sales and marketing of the SNF, and asked the
7 parties to agree on the scope of that discovery, which the parties ultimately did. See Doc.
8 1483. The order also recognized that regulatory documents were being produced.
9 Although not mentioned in the order, Bard separately produced to the Plaintiff all adverse
10 event data concerning the SNF. In addition to the SNF complaint data maintained after
11 Bard acquired the rights to the SNF, Bard produced comprehensive data regarding earlier
12 adverse events concerning the filter (which was included in the "thumb" drive provided to
13 the Court). The only materials the Plaintiff was not provided were design and
14 development documents. Since the Plaintiff was not contending the SNF was defective,
15 that material had no relevance to her claims. Nor does it have any bearing on the
16 complication rates which are now her focus.

17 Given the absence of a disclosure or discovery issue, it is difficult to understand the
18 basis of the Plaintiff's present complaint. Bard readily acknowledges the point of the
19 documents provided the Court by the Plaintiff – i.e., that Bard identified the SNF as a
20 "predicate" device for the Recovery Filter and that the reports of SNF complications
21 received by Bard were often less than those received regarding retrievable filters (with
22 some exceptions). In response to those documents, Bard should be entitled to present
23 proof that the complications regarding the SNF, as a permanent filter, are reported much
24 less frequently than complications regarding retrievable filters. In that regard, Bard's
25 expert Dr. Christopher Morris has explained that phenomenon. See Report Excerpt
26 attached as Exhibit "A". Bard should also be permitted to discuss the medical literature
27 that supports the notion that the SNF does indeed experience significant complications
28 itself, and in many instances, complications at a higher rate than the G2. Those articles

1 discussing the SNF complications were cited frequently in the reports of both sides'
 2 experts (as outlined in the "thumb" drive submitted by Bard). In short, the issue is no
 3 surprise, and has been a central part of this litigation from the outset.

4 As long as the Plaintiff argues that the SNF was a superior filter to the G2, Bard
 5 should be permitted to present evidence that refutes that claim. If the Plaintiff believes
 6 Bard's internal documents contradict the company's position on that issue, she is certainly
 7 free to cross-examine witnesses with those documents or otherwise contradict Bard's
 8 argument. However, she has cited no basis why evidence she considers to contradict
 9 Bard's position somehow bars the Defendants from introducing contrary evidence in the
 10 first instance. An alleged conflict in the evidence is the archetype justification for cross-
 11 examination; it is not a ground for exclusion.

12 In sum, the Plaintiff has evidently abandoned, and rightfully so, her initial assertion
 13 that CMO No. 10 denied her evidence necessary to rebut Bard's position. As a
 14 consequence, the alleged evidentiary conflict she complains about is appropriately
 15 addressed through cross-examination and the regular adversarial process.

16 RESPECTFULLY SUBMITTED this 19th day of March, 2018.

17 SNELL & WILMER L.L.P.

18 By: s/Amanda C. Sheridan

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

s/Amanda C. Sheridan

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